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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 256

WILLIAM T. McCLUSKEY, JR.,
Petitioner,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION.

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In the Supreme Court of the United States

OCTOBER TERM, 1968.
No. 1544.

WILLIAM T. McCLUSKEY, JR.,
Petitioner,
v.
NORFOLK AND WESTERN RAILWAY COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION.

COUNTER STATEMENT OF THE CASE.*

Petitioner omitted the following undisputed facts: (1) the crossing was located in flat, sparsely-populated, open country; (2) the day in question was bright and clear; (3) the physical features of the crossing, and surrounding area, including the bad order cars on the storage track, had remained unchanged for years; (4) petitioner was familiar with the crossing, having passed over it in his employer's truck on many occasions; (5) petitioner was familiar with the physical features of his truck; (6) the diesel locomotive headlight was burning brightly as it approached the crossing.

Additionally, it is undisputed that petitioner stopped momentarily at a point of safety before proceeding onto the main track. This point of safety was not two and a half feet from the overhang of the diesel as suggested in the last paragraph on page 8 of petitioner's brief. Rather, it was at least four feet from the diesel overhang, a dis-

* This case is reported in 408 F. 2d 1025 (1969).

tance which petitioner requested his expert witness, a civil engineer, to assume, in order to calculate how far petitioner could see down the tracks immediately prior to the accident.

REASONS FOR DENYING THE WRIT.

The well-established Ohio law is that a highway traveler about to proceed over a railroad grade crossing must look and listen for approaching trains at a point and time where looking and listening are effective. *The Detroit, Toledo & Ironton Rd. Co. v. Rohrs,* 114 Ohio St. 493, 151 N.E. 714 (1926). The Supreme Court of Ohio time and again has approved and followed this strict mandate, most recently in *North v. Pennsylvania Railroad Company,* 9 Ohio St. 2d 169, 224 N.E. 2d 757 (1967), where the court held that a summary judgment, prior to trial, should have been granted in favor of the railroad on the issue of liability.

It is undisputed that the petitioner herein, from a point of safety, had a view of 750 feet down the tracks, and yet, petitioner states that he began to proceed forward from that point of safety and onto the main track when the diesel was 600 feet away. See the first incomplete paragraph on page 5 of petitioner's brief. Had the plaintiff looked, he must have seen; if he did not look he cannot recover. *The Detroit, Toledo & Ironton Rd. Co. v. Rohrs,* 114 Ohio St. 493, 503, 151 N.E. 714, 717 (1926).

The facts of this case place it squarely within the holdings of *Newcomb v. Baltimore & Ohio Railroad Co.,* 352 F. 2d 406 (6th Cir. 1965), *Detroit T. & I. R. Co. v. Yeley,* 165 F. 2d 375 (6th Cir. 1947), and *Baltimore & O. R. Co. v. Joseph,* 112 F. 2d 518 (6th Cir. 1940), *cert. den.,* and *reh. den.,* 312 U.S. 682 (1941), which thoroughly review the applicable Ohio law. These cases can be distinguished

from petitioner's only insofar as their facts are more favorable to the plaintiff highway travelers considered.

Any difficulty which petitioner might have had in seeing down the tracks was caused by the physical makeup of his own truck of which he was well aware and over which respondent had no control. *Price v. New York Central System,* 91 F. Supp. 898 (N.D. Ohio 1950), *Anderer v. The Baltimore and Ohio Railroad Company,* 300 F. 2d 14 (6th Cir. 1962), *Norfolk and Western Railway Company v. Hagy,* 201 Va. 183, 110 S. E. 2d 177 (1959), *cert. den.,* 361 U.S. 966 (1960).

All of the foregoing cited cases held that the plaintiffs therein had failed to sustain the burden of proof and therefore were not entitled to have their causes submitted to the jury.

Petitioner's questions and argument do not demonstrate that the United States Court of Appeals for the Sixth Circuit decided an important state question in a way in conflict with applicable state law.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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